

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
445 TWELFTH STREET, S.W.
WASHINGTON, D.C. 20554

WT Docket No. 02-276

In the Matter Of

COMMISSION SEEKS COMMENT ON
DISPOSITION OF DOWN PAYMENTS
AND PENDING APPLICATIONS FOR
NEXTWAVE LICENSES WON DURING
AUCTION NO. 35

Comments of Scott Reiter and Vincent McBride

Auction No. 35 Applicants (the “Applicants”) Should Be Able To Dismiss Pending Applications

- The Federal Communications Commission (“FCC”) was unable to timely deliver the licenses and remains unable to do so. This fact alone warrants opt-out.

The FCC has never delivered the Nextwave Telecom Inc. (“Nextwave”) licenses that we won in Auction No. 35, over 20 months ago, and there is no firm date of delivery proposed.

(We understood that there was pending litigation and might be granted licenses that had legal clouds, however the fact remains that we were not granted *any* Nextwave licenses.)

Dismissing Applicants Should Not Incur Default Penalties or be Barred from Acquiring the Spectrum Outside of Auction 35

Even considering a penalty for the winning bidders, who have to date displayed Herculean patience, is laughable.

The fact is that the FCC defaulted on its obligation to the winning bidders of Nextwave licenses in Auction No. 35 by selling us licenses that it had no legal right to. We should discuss the penalty the FCC should pay the winning bidders. We have invested quite a bit of money, energies and time in good faith and feel that the sale of properties (spectrum) not legally belonging to the FCC constitutes fraud.

These resources expended in good faith should serve as our deposit to reserve all rights to the spectrum, if and when the FCC *ever* obtains the legal right to sell us what we have already bought from the FCC.

- Since the FCC is legally unable to issue the licenses at this time, applicants have not failed to pay any amounts “due”; thus, there has been no “default” by applicants at this time and “default penalties” should not apply

As we have demanded in the past, beginning July 9, 2001¹, “Grant us the licenses, or IMMEDIATELY refund our deposits (which have been held by the FCC since Nov. 2000 *interest free*)”

Time is of the Essence; the Commission Should Act as Soon As Possible To Refund The Remaining Down Payment On Dismissed Licenses And Forgive The Debt

- The contingent Auction No. 35 liability needs to be removed so that alternative plans can be implemented to serve markets with critical needs for increased service
- Immediate coordination with DOJ is justified so that refunds can be processed quickly

Prompt action still can have a positive impact on the wireless sector in 2002

The Integrity of the FCC’s Auction Processes Will Not Be Undermined By According Relief

- Many licenses already have been issued and paid for as a result of Auction 35, thus establishing the integrity of the auction
- Auction integrity requires that applicants pay bid amounts in full when due. Here the bid amounts with respect to the NextWave and UrbanComm licenses have not come due, and canceling the auction due to unanticipated changes in material circumstances will not compromise the auction integrity
- Here, most of the Auction 35 bidders already have acquired licenses and participated in an extended settlement effort to preserve the auction results. Thus, they have proved their *bona fides* and the Commission need not be concerned that they were insincere or speculative bidders
- The circumstances that now exist are unprecedented and may never be duplicated and as a result there will be no adverse precedential effect
- The case in the U.S. Supreme Court against NextWave will not be impaired
 - The issue in that case is whether NextWave retains the licenses; it is irrelevant if the FCC wins whether the agency reissues the licenses pursuant to Auction No. 35 or by subsequent auction

¹ See letter from Vincent D. McBride and Scott D. Reiter to Michael K. Powell, Chairman, Federal Communications Commission (“FCC”) (Aug. 25, 2001); letter from Scott D. Reiter and Vincent D. McBride to Michael K. Powell, Chairman, FCC (July 16, 2001); letter from Vincent D. McBride and Scott D. Reiter to Michael K. Powell, Chairman, FCC (July 9, 2001).

The Government Clearly Has the Obligation and Authority to Return the Monies that Have Become Illegally Confiscated Since the Date it Became Apparent the FCC Had No Legal Right to Sell the Nextwave Licenses to the Applicants.

We feel this unjust taking of our property is unconstitutional and undermines the integrity of the auction process. We won the licenses (over 20 months ago), yet we have not been granted the licenses that we won. We have been paid no interest, or restitution since the FCC has defaulted on its obligation to the Auction No. 35 winners of Nextwave licenses.

We don't have the use of these licenses, and we don't have the use of our deposits. It's just not right!

Respectfully Submitted,

Scott D. Reiter
738 Pier Ave., Suite P
Santa Monica, CA 90405

Vincent D. McBride
2655 30th Street, Suite 203
Santa Monica, CA 90405

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